Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1451

FREDERICK B. PFISTER,

Petitioner

v.

HONORABLE NEWELL EDENFIELD
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

HONORABLE ROBERT HALL
(ASSIGNED SUCCESSOR DISTRICT JUDGE)
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA

and

DELTA AIR LINES, INC., et al.,

Respondents

OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT

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JURISDICTION

The order of the Court of Appeals of November 13, 1979 was reissued as the mandate on December 18, 1979. On December 5, 1979, the Court of Appeals denied a motion for the panel to stand recused and to vacate its prior orders, and the Court also denied the petition for rehearing on that date. Jurisdiction to review the orders in question is conferred on this Court by Section 2101(c), Title 28, United States Code.

QUESTION PRESENTED

1. Whether the Court of Appeals properly dismissed appeals taken from non-final, non-appealable pretrial orders which dismissed seven counts of the complaint, but left intact Count I, which demanded payment of all benefits previously terminated, reinstatement to disability status, certain civil penalties, an injunction to prevent the defendants from discriminating against the plaintiff, attorneys' fees, costs, and other relief?

STATUTES INVOLVED

The only statute drawn in question by this petition is 28 U.S.C. § 1291, which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, The District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Because the petition omits certain material facts, distorts others, and fails to adequately describe the vilification of counsel and the judges of the District Court and Court of Appeals, respondents are obliged to make a counterstatement of the case.

A. Pre-Transfer Proceedings

Rather than respond to all of the allegations contained in Petitioner's Brief at 6-11, Respondents refer the Court to the complaint and the answers.

Pfister filed his complaint on October 26, 1976, and the Respondent Delta[1] promptly moved for a change of venue on December 20, 1976. After securing two extensions of time, Pfister finally filed his response to the motion for change of venue in late February, 1977. A hearing was held before Judge Joseph Waddy of the United States District Court of the District of Columbia on March 21, 1977. Ten days later, Judge Waddy issued an order granting the change of venue and transferring the case to the Northern District of Georgia.

Pfister then filed an avalanche of motions and appeals, all of which delayed the transfer of the case for one year and five months. He first moved the District Court for an order certifying an appeal under 28 U.S.C. §1292(b). That motion was denied within thirteen days. Pfister then filed a notice of appeal from the order denying certification and soon thereafter moved for an extension of time to transmit the record to the Court of Appeals.

He also petitioned the Court of Appeals for Writ of Mandamus or Prohibition to nullify the March 31, 1977 order of Judge Waddy. That motion was denied on August 2, 1977, and two weeks later Pfister moved for a stay of the transfer and of all proceedings and also requested a rehearing en banc on the motion for mandamus or prohibition. On September 20, 1977, the Court of Appeals dismissed the appeal. At that time, Pfister had not yet filed his opening Brief.

On September 24, 1977, and again on October 27, 1977, Pfister moved for a stay of the mandate pending the filing of his petition for certiorari. The Court of Appeals granted that motion to and including December 15, 1977. Two days before that deadline, Pfister filed another motion for a stay of the mandate pending his

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[1]This brief is submitted on behalf of all defendants except Charles T. Bishop, Jr. and Brewer Adjustment Company. Where used in this brief, those Respondents are collectively referred to as "Delta". The Petitioner is referred to by his name.

petition for certiorari. Pfister also filed several other motions with the Court of Appeals, which finally granted a stay to and including January 30, 1978, and ordered that no further stays would be granted.

On January 30, 1978, Pfister finally filed a petition for certiorari, which was docketed as No. 77-1068 and named Judge Waddy as a Respondent.

This Court promptly denied certiorari, whereupon Pfister requested a stay of the order denying certiorari, which was denied by Mr. Chief Justice Burger. Pfister then reapplied to suspend the effect of the order denying certiorari, which was promptly denied by Mr. Justice Brennan. Finally, on May 17, 1978, Pfister petitioned this Court for rehearing on his petition for certiorari. Less than one month later, on June 12, the petition for rehearing was denied.

On September 13, 1978, the Clerk of the United States District Court for the District of Columbia transferred the case to the Clerk of the Northern District of Georgia.

B. Post-Transfer Proceedings (District Court Rulings)

Shortly after the case was finally transferred, Delta moved to strike and/or dismiss various counts of the complaint. In an order filed December 21, 1978, the District Judge left Count I of the complaint virtually intact, but he dismissed Counts II, III and IV. He also directed Pfister to file a supplemental brief within twenty days with respect to Counts V through VIII of the complaint.

Pfister then filed a motion for reconsideration of that order, as well as a memorandum of points and authorities in response to the direction of the Court. While his motion for reconsideration was pending, on January 18, 1979, Pfister filed a notice of appeal from the order filed on December 21, 1978. Pfister then secured two extensions of time for transmission of the record in his first appeal, which was docketed as No. 79-1763.

On July 2, 1979, Judge Edenfield dismissed Counts V through VIII, and Pfister noticed a second appeal on July 30, 1979, which appeal was docketed as No. 79-3207.

Three days later, on August 2, 1979, Pfister filed a motion to disqualify Judge Edenfield. In that motion, he alleged that the District Judge is "consciously and intentionally abusing his office...under the ruse of legal exegesis", that his conduct is "grossly aberrant", "that his decision-making is motivated by extra-judicial directives and pressures more customarily referred to as political favors", that he is "beholden" to certain of the defendants' counsel, that he "issued a ruling of frivolous authority and amateurishly conceived", that he is "acting as a political pawn", that he has "knowingly and consciously, as well as willfully and wantingly [sic], maliciously abused his office", that he is "deliberately protracting [this cause] in order to cause the plaintiff maximum harm and detriment", and so on.[2]

C. Post-Transfer Proceedings (Court of Appeals Rulings)

In the first appeal taken to the Fifth Circuit (No. 79-1763), Pfister failed to file his opening brief within the time limitations, and the defendants moved to dismiss the appeal on April 20, 1979. That motion was granted on July 3, 1979, after Pfister failed to file any response to the motion. Pfister then filed an application to recall and stay the mandate and for an extension of time to file his petition for rehearing. Delta first learned of this motion when it received a copy of an order filed on August 9, 1979, which granted the motion. Pfister then filed a petition for rehearing and suggestion for hearing en banc, but that was denied on October 1, 1979.

On October 6, 1979, Pfister filed a motion for a stay in No. 79-1763 and to consolidate that appeal with the appeal in No. 79-3207.

Delta then moved to dismiss the appeal in No. 79-3207, and it also moved the Court to hold Pfister's counsel personally responsible for the costs, including attorneys' fees, of that appeal. Delta asserted that the appeal had been taken in bad faith for the purpose of delay and harassment and that attorneys' fees could therefore be

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[2]Further evidence of the unprofessional conduct of Petitioner's counsel throughout this litigation can be found in the Court of Appeals order filed November 13, 1979 (Petitioner's Appendix J), where the Court struck his entire brief "as containing impertinent, disrespectful and unnecessarily abusive references to the district judge and to opposing counsel and parties." Delta also refers the Court to Document No. 14 in the record (Motion to Disqualify Legal Counsel for the Defendants-Appellees).

taxed as part of the costs. Furthermore, Delta argued that the Court could hold Pfister's counsel personally responsible for all those costs, including attorneys' fees, under 28 U.S.C. § 1927. On the ground that the motion for stay and consolidation filed in No. 79-1763 was frivolous, dilatory and filed in bad faith, Delta also moved to hold counsel personally responsible for the costs generated by that motion.

Pfister's counsel then responded with a flood of motions in both appeals. He moved to stay all the proceedings, to disqualify legal counsel, to impose sanctions upon opposing counsel, and for leave to file an amended complaint in the Fifth Circuit. Due to delayed receipt of all of these motions,[3] Delta was unable to respond until November 5. All of its responses were returned unfiled, but nevertheless the Court denied all of Pfister's motions on November 13. In the meantime, the Court had already denied the motion for stay of the mandate in No. 79-1763 and granted Delta's motion to dismiss the appeal in No. 79-3207. As part of that order, the Court remanded Delta's motion to hold Pfister's counsel personally responsible for the costs, including attorneys' fees, of the appeal taken in No. 79-3207. That order was filed on November 5, 1979. On or about November 21, 1979, Pfister filed a motion seeking the recusal of the Fifth Circuit panel and the vacation of the orders of November 13 and November 5. He also filed a petition for rehearing with then-Chief Judge Brown on November 21, 1979. Delta did not receive a service copy of either of those motions.

On December 5, 1979 the Court of Appeals denied the motion for recusal and vacation of prior orders. It also denied the petition for rehearing, which Chief Judge Brown had referred to the panel which entered the prior orders. In addition, the Court ordered Pfister's counsel, before seeking to practice further before the Court, to obtain admission to its bar as required by Local Rule 5. The clerk was directed to accept no further findings from Pfister's counsel until such time as he obtained admission to the Bar of the Court.

[3]During the course of this litigation, it has not been unusual for Delta to receive service copies late or not at all. So that the Court can appreciate the problem and Delta's efforts to resolve it, Delta refers the Court to the exhibits to Document No. 11 in the record (Appellees' Response to Appellant's Motion for Stay and Consolidation).

Apparently Pfister's counsel also filed complaints of judicial misconduct with the Fifth Circuit, for in an order filed in February 27, 1980, Chief Judge James P. Coleman dismissed complaints filed against Judges Gee, Henderson, Hatchett, and Brown. Delta never received copies of those complaints, however.

D. Reassignment of Case

When several new district judges were appointed to the bench in the Northern District of Georgia, the judges of that Court transferred part of their cases to the newly-appointed judges in order to effect an equitable distribution of the workload. This case was one of those transferred by Respondent Judge Edenfield to Respondent Judge Hall. Accordingly, in an order filed December 19, 1979, Respondent Judge Edenfield denied Pfister's motion for disqualification as moot. On January 18, 1980, Pfister filed a notice of appeal from that order. Rather than paying the docket fee for the appeal, he filed a motion for *in forma pauperis* status with the Fifth Circuit Court Of Appeals. However, this motion should have been submitted to the District Court in the first instance under Rule 24 of the Federal Rules of Appellate Procedure. Therefore, on February 28, 1980, the Clerk of the Fifth Circuit returned, unfiled, Pfister's motion for leave to proceed *in forma pauperis* and granted Pfister thirty days within which time he might either file the motion with the District Court or pay the docketing fee. Later, Pfister's counsel contacted the office of the Clerk of the Fifth Circuit to advise that he had not received the February 28 letter, and he was granted an additional fifteen days to file any motion in the District Court.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY DISMISSED THE TWO APPEALS TAKEN FROM NON-FINAL, NON-APPEALABLE PRETRIAL ORDERS.

A "final decision" appealable under 28 U.S.C. § 1291 is one in which there is an effective "judgment", as defined by Federal Rules of Civil Procedure 54(a) and 58, "which ends the litigation ... and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229 (1945). See *Brown v. New Orleans Clerks & Checkers Union,* 590 F.2d 161 (5th Cir. 1979); *In re 1975 Grand Jury Investigation,* 566 F.2d 1293, 1296-1298 (5th Cir.), *cert. denied,* 437 U.S. 905 (1978).

In the instant case, there can be no doubt that the District Court's orders did not end the litigation. Although those orders dismissed some of Pfister's claims, the Court plainly left standing other claims, such as: Pfister's claim that he was improperly denied disability and retirement benefits, his claim against the plan administrator for civil penalties of $100 per day under 29 U.S.C. § 1132(c), and his claim that defendants be enjoined from future acts of discrimination against him personally. In short, either singly or in combination, the District Court's orders cannot even arguably be deemed a "final decision" within the meaning of Section 1291.

Nor is this a case where the District Court's orders can be deemed final, and hence appealable, under Federal Rules of Civil Procedure 54(b). The express language of Rule 54(b) provides that, in a multi-claim suit, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." See *Ryan v. Occidental Petroleum Corp.,* 577 F.2d 298 (5th Cir. 1978); *Jones v. Menard,* 559 F.2d 1282, 1284 n. 1 (5th Cir. 1977). There is nothing in the orders or otherwise in the record to indicate that the District Court made the required "express determination" or expressly directed the entry of judgment. And "[i]n the absence of such determination and direction," Rule 54(b) further provides

that "any order or other form of decision, however designated, which adjudicates fewer than all of the claims ... shall not terminate the action as to any of the claims..., and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims...of...the parties."

Apparently, Pfister believes that the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), authorizes an appeal from any order which is adverse to him. Piecemeal appeals are foreign to the federal system and ordinarily serve no purpose but to prolong the litigation interminably. That is exactly what is occurring in this case. Furthermore, the cases cited by the Petitioner, *Gillespie v. United States Steel Corp.,* 379 U.S. 148 (1964); *Land v. Dollar,* 330 U.S. 731 (1947); and *United States v. General Motors Corp.,* 323 U.S. 373 (1945), do not support his contention on appealability and jurisdiction. The issue of appealability was not dealt with in either of the latter two decisions, and this Court recently dealt with the *Gillespie* case in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 477 n. 30 (1978), as follows:

> In Gillespie, the Court upheld an exercise of appellate jurisdiction of what it considered a marginally final order that disposed of an unsettled issue of national significance because review of that issue unquestionably "implemented the same policy Congress sought to promote in § 1292(b)," and the arguable finality issue had not been presented to this Court until argument on the merits, thereby ensuring that none of the policies of judicial enconomy served by the finality requirement would be achieved were the case sent back with the important issue undecided. In this case, in contrast, respondents sought review of an inherently nonfinal order that tentatively resolved a question that turns on the facts of the individual case; and, as noted above, the indiscriminate allowance of appeals from such discretionary orders is plainly inconsistent with the policies promoted by § 1292(b). If Gillespie were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.

Just as in *Western Electric Co., Inc. v. Milgo Electronic Corp.,* 568 F.2d 1203, 1206-1207 (5th Cir. 1978), the only injury

suffered by the plaintiff as a result of the District Court's orders is that he might have to return to the District Court to try those claims just as if he had waited until after trial on the remaining count to appeal. "That is not enough." *Ibid.*

II.

THE COURT SHOULD TREAT THE PETITION FOR COMMON LAW CERTIORARI AS A PETITION FOR CERTIORARI, AND IT SHOULD THEN DENY THE PETITIONS FOR CERTIORARI, MANDAMUS, PROHIBITION, AND AN INJUNCTION.

This Court's rules provide that the issuance of any writ authorized by 28 U.S.C. § 1651(a) "is not a matter of right but of sound discretion sparingly exercised." Sup. Ct. R. 30. "Mandamus is an extraordinary remedy, available only in rare cases." *Roberts v. United States District Court,* 339 U.S. 844, 845 (1950). Similarly, the writ of common law certiorari should be allowed only in extraordinary circumstances. *In re Chetwood,* 165 U.S. 443 (1897).

No such extraordinary circumstances exist in this case. The District Court orders from which appeals were taken simply struck certain counts from the complaint, and similar orders are entered in a large percentage of the cases handled in the lower courts. If this Court is called upon to review all of those orders, its already-crowded docket would become totally unmanageable. Pfister is simply attempting to chop up the litigation through piecemeal appeals and delaying tactics, all in the face of the firm congressional policy against such appeals. "The extraordinary writs . . . may not be used to thwart the congressional policy against piecemeal appeals." *Parr v. United States,* 351 U.S. 513, 520-521 (1956).

The situation is exacerbated even further by the fact that Pfister never filed his opening brief in either of the two appeals taken to the Fifth Circuit. Therefore, the Court of Appeals has never even considered the issues which he is now attempting to place before this Court. A review of the record clearly indicates that his purpose in taking those two appeals and then filing this petition for extraordinary writs is delay and harassment.

CONCLUSION

The petition for common law writ of certiorari should be treated by this Court as a petition for statutory certiorari and denied. The Court should also deny the petitions for other extraordinary writs so that the firm Congressional policy against piecemeal appeals will not be violated and so that this case may move expeditiously toward trial and a final resolution of the plaintiff's complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief in Opposition to Petition for Common Law Certiorari and Writ of Mandamus and/or Prohibition and/or Injunction to District Court and Court of Appeals for Fifth Circuit were served by depositing the same in the United States mail, with first class postage prepaid, to the following:

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